United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

991

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,008

GRANT SYKES,

Appellant,

v.

UNITED STATES,

Appellee.

APPEAL FROM THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

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ISSUES PRESENTED

1. Does an attorney's absence from court constitute a presence in the court?

2. Is an attorney's absence from court a criminal contempt where the attorney's absence is due to confusion and faulty recollection?

3. May a trial court find an attorney in criminal contempt of court for his failure to appear before him, because of a desire to stop general absenteeism and irrespective of the explanatory circumstances of the attorney's involvement in another court, and of emotional strain or stress due to personal circumstances?

4. Is a court's resort to its contempt powers an infringement upon due process where a more reasonable alternative is available?

This is an original appeal.

STATUTORY PROVISIONS

11 D. C. Code Sec. 101, Judicial Power. (Dec. 23, 1963, 77 Stat. 478, P. L. 88-241, Sec. 1.)

The Judicial power in the District of Columbia is vested in:

(1) Inferior courts, namely,

The District of Columbia Court of General Sessions;

The Juvenile Court of the District of Columbia, and

(2) Superior courts, namely,

The District of Columbia Court of Appeals

The United States District Court for the District of Columbia;

The United States Court of Appeals for the District of Columbia Circuit; and

The Supreme Court of the United States.

11 D. C. Code Sec. 982(a)., Contempt Powers, P.L. 87-873 & Sec. 4, Stat. 1172, P. L. 88- 60, Sec. 4, 77 Stat. 78

(a) The District of Columbia Court of General Sessions may compel the attendance of witnesses by attachment, and in any civil or criminal case or proceeding in the Court, the Judge may punish for disobedience of an order, or for contempt committed in the presence of the Court, by a fine not exceeding $50.00 or imprisonment not exceeding 30 days.

18 U.S.C. Sec. 401 (1969 ed.) Power of Court

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as -

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance of its lawful writ, process, order, rule, decree or command.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24008

GRANT SYKES — Appellant

v.

UNITED STATES OF AMERICA, — Appellee

APPEAL FROM THE DISTRICT OF COLUMBIA

COURT OF APPEALS

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On July 8, 1970 this court granted appellant's petition for allowance of an appeal from the judgment of the District of Columbia Court of Appeals Case No. 5042.

REFERENCES TO RULINGS

The District of Columbia Court of Appeals in its opinion of February 4, 1970 embraced the "minority" rule that an attorney's absence from court is a contempt committed in the court's presence. (R40, OP 3,).

STATEMENT OF THE CASE

Appellant was appointed attorney of record in the case of United States v. James, G. S. Criminal No. 14975-69, which came before the Court of General Sessions, Criminal Division, on April 28, 1969. (R 40, 1) at which time the case was continued until May 8, 1969. The case was calendared on May 8th before Chief Judge Greene. Appellant failed to appear on May 8th and the case was continued until May 13.

On May 13, Chief Judge Greene presided at a show cause hearing at which appellant stipulated to the fact of his absence and testified that he had been mistaken about the original date set for the trial, having confused it with his other G. S. Criminal cases, all of which he had set down for the following Thursday. Appellant was adjudged guilty of contempt of court. Motion for a New Trial was made and denied without a hearing on June 5, 1969. Appellant appealed to the District of Columbia Court of Appeals where Argument was heard on December 8, 1969. An adverse

decision was issued on February 4, 1970. A Petition for Rehearing and suggestion that Rehearing be held en banc was denied on March 4, 1970. This appeal followed.

SUMMARY OF ARGUMENT

Appellant submits that the opinion of the District of Columbia Court of Appeals is obviously wrong.

First the trial court was bound by a Congressional statute which clearly limited its contempt power to punish only for disobedience of an order or for contempt committed "in the presence of the court."

Decisions of this Court and of the Supreme Court have previously interpreted and clarified the meaning of the applicable Congressional phrase "in the presence of the court." This Court in Klein v. United States, 80 U. S. App. D. C. 106, 151 F.2d 286 (1945) in interpreting a pertinent Congressional statute held that an attorney's absence from court was not a "presence" so as to subject him to prosecution for contempt. The District of Columbia Court of Appeals by holding that an attorney's "absence is a presence" totally disregarded the precedent set by this court. Whether the error below proceeded from the use of an erroneous precedent, or in the misapplication of a Congressional statute, it is clear that the court below did err.

Second, to convict one of criminal contempt, wilfulness or criminal intent must be alleged and shown. This was not done.

Third, appellant moreover is, and in future may be, but one of a great number of cases in which attorneys and others may be held in criminal contempt of court for mere confusion or forgetfulness. Such is now clearly possible under the "minority" rule adopted below. Since the unwholesome precedent was set by the prestigious Chief Judge of the Court of General Sessions, if allowed to stand, other judges may be encouraged to follow the example set by him.

Fourth, the use of an authoritarian instrument such as the contempt power should be eschewed as an infringement upon Due Process where a more reasonable alternative is available.

ARGUMENT

I

An Attorney's absence from court does not constitute a presence in the court.

The District of Columbia Court of Appeals has decided a question of substance relating to the contempt powers of an Inferior Trial Court of this jurisdiction, in a way not in accord with applicable decisions of this court, contrary to decisions of the Supreme Court of the United States, and contrary

to General Law and Congressional Statute.

The authority of the D. C. Court of General Sessions in relation to contempts is delimited in Section 11-982(a) of the District of Columbia Code, 1967 edition, which provides as follows:

> "(a) The District of Columbia Court of General Sessions may compel the attendance of witnesses by attachment, and, in any civil or criminal case or proceeding in the court, the judge may punish for disobedience of an order, or for contempt committed in the presence of the court, by a fine not exceeding $50.00 or imprisonment not exceeding 30 days." (Emphasis added by Appellant.)

All courts of the District of Columbia, except the Supreme Court were established by the Congress of the United States. Originally, Congress in the Act of 1789 (1 Stat. 73, 83) provided that courts of the United States "shall have power---to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Unfortunately, many abuses arose, culminating in the Act of March 2, 1831 (4 Stat. 487) which contained the following language.

> "That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command to the said courts." (Emphasis added by Appellant)

Substantially identical language has survived to the present time. Today, for example, Section 18-401 of the United States Code provides as follows: (Emphasis added by Appellant).

> A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . .
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful court process, order, rule, decree or command.

Decisions of the United States Supreme Court and of this court have previously interpreted and clarified the meaning of the applicable Congressional phrase "in the presence of the court." Reflecting on the meaning of the phrase, the Supreme Court held in Nye v. United States, 313 U. S. 33 at 49, 85 L. Ed. 1172:

> .. It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence' suggests physical proximity, not relevancy. . .
>
> .. If the phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a reasonable tendency to obstruct the administration of justice, then the contradictions which Congress sought to alleviate have been largely restored."

This court in Klein v. United States, 80 U. S. App. D. C. 106, 108, 151 F 2d 286 (1945) in construing 28 U.S.C. 385 (1946) [1/] held that an attorney's absence from court was not a "presence" so as to subject him to prosecution for contempt,

> The petitioner (contemnor) himself was absent. His acts ad interim were likewise absent. His doings went with him. It would seem like an exquisite and palpable contradiction of terms to complain in one breath that the petitioner (contemnor) and his acts were absent, and in the next breath to say that such absence constituted a presence, that is a contempt committed in the presence of the court. (at 108)

Despite the legislative history, and the rulings of higher courts, the District of Columbia Court of Appeals in its opinion dated February 4, 1970, adopted a contrary rule: (R40, 3)

> Today, we explicitly adopt the rule that where an attorney fails to appear in court when he has a duty to do so, the offensive conduct, to wit, the absence, occurs in the presence of the court and the unexcused absence may be held to be contempt of court. (Emphasis added by Appellant)

Appellant notes that as promulgated, the rule is limited to "attorneys." The court is silent as to whether the rule would apply to defendants, plaintiffs, witnesses, jurors, policemen, prosecutors, judges, marshalls, clerks, reporters and others who also have a duty to appear in court.

The rule of the Court below if extended to defendants clearly would provide a simplified procedure for the prosecution

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1/ Predecessor to 18 U.S.C. Sec. 401 (1969 ed.)

of "bail jumpers." Willful absence would not need to be alleged nor proven and the newly adopted rule clearly would render the appropriate act of Congress superfluous. (U.S.C. 18-3150, P. L. 89-465, Sec 3(a) June 22, 1966, 80 Stat. 216). By being subjected to such a rule, trial attorneys clearly will run a high occupational risk of ending up with a criminal record.

The court below supported its adoption of a "minority" rule by reference to Annot., 97 ALR. 2d 431 (1964). (R 40, 2) The court below placed special emphasis on Arthur v. Superior Court, 62 Cal. 2d at 409, 398 P. 2d 777,780 (1965). (R 40, 3) Appellant's reliance on Klein supra, is termed "misplaced" because this court when interpreting the meaning of the phrase:

> in the presence of the court or so near thereto as to obstruct the administration of justice

"was construing 28 U.S.C. 385 (1946) which relates to proceedings for contempt committed in a Federal Court." (R 40, 3-4) That this court in Klein had interpreted the meaning of a Congressional, rather than a California statute was not deemed to have special significance even though Klein, supra is the leading D. C. case cited in Annot., 97 ALR. 2d 431 (1964) at 446.)

Will lawyers in this jurisdiction henceforth be well advised to rely on state court opinions explicating on California

statute rather than to rely on the opinions of this court (and of the Supreme Court) when they seek guidance in the meaning of Congressional phraseology?

Appellant submits that it amounts to a legal absurdity to hold that a superior court in the District of Columbia is restrained by Congress from punishing as a contempt an attorney's express and defiant refusal to return to court after a recess, plainly the case in Klein, supra, while Congress employing substantially the same language will permit an inferior court (See 11 D. C. Code Sec. 101) to punish as a criminal contempt the absence of an attorney because of "oversight, neglect, or faulty recollection." (R 40, 4)

Appellant submits that the "minority rule" adopted by the Court below does violence to the plain and unambiguous language of the applicable Congressional statute. This is especially true after such language has been interpreted by the highest court in the United States. The phrase "or so near thereto as to obstruct the administration of justice" (which language obviously expands on the phrase, "in the presence of the Court") has been held by the United States Supreme Court to connote misbehavior in the vicinity of the court. Nye v. United States, 313 U. S. 33 at 49, 85 L. Ed. 1172.

II. The Court below Erred in Holding that the Absence of an Attorney is Contempt of Court Irrespective of Lack of Intent or Willfulness.

Appellant questions the merit of a rule that equates oversight, neglect or faulty recollection with criminal misbehavior. (R 40, 4). An indispensable ingredient of criminal contempt is wrongful intent or willfulness. In re Watts, 190 U. S. 1, 32, 35; Panico v. United States, 375 U. S. 29. Offutt United States, 98 U. S. App. D. C. 29, 232 F 2d 69; United States ex rel Porter v. Kroger (C. A. 7) 163 F. 2d 168. There was no allegation of criminal misbehavior in the charges. (Order to Show Cause (R-24).

The Court below concluded that appellant's failure to appear in the Assignment Court at any time on May 8 because of oversight, neglect, or faulty recollection was inexcusable. (R 40, 4). The court's opinion in support of its conclusion asserts:

> Appellant kept a record book in which he recorded his court appointments, but instead relied upon his memory in the instant case. He failed to inquire about which court had attempted to contact him, after being told by the stenographer that he had received what he admittedly thought was a strange call. Nor did he at that time check his record book, since he presumed it was the circuit court. And while it may be true that he could not avoid the conflict between court engagements, he did nothing to mitigate the effect of his absence. (40, 4)

The above statements in the opinion of the court below reveal a certain misconception of the facts. There is nothing in the record to support an assumption that appellant had his record book with him that day. As a matter of fact appellant's recollection is that he left it at home, and therefore he could not have referred to it. Also unsubstantiated is the court's conclusion that appellant did nothing to mitigate the effect of his absence. While his recollection is necessarily dimmed by the long passage of time, appellant vaguely recalls making several telephone inquiries in an attempt to learn the source of the strange call.

Appellant is dismayed by the callous use of language on Page 3 of the Opinion below, (R 40) wherein it cites a paragraph out of a California case, Arthur v. Superior Court, 398 P. 2d at 780-81, and by use of brackets inserting appellant's name in the body of the indented paragraph gives the impression and allows an inference to be drawn that appellant himself, was (1) an elusive attorney and a recurring problem in the trial court, (2) that there was evidence of repeated offenses by appellant, (3) that appellant was an everextended attorney who tried the patience of trial judges through (repeated) absences, etc.

Appellant refers the court to a careful reading of the record which does not disclose any such contumacious

conduct, for, in fact, the trial judge stated just the opposite:

> Well, I'm certainly most reluctant to hold an attorney in contempt of court and as far as (Appellant) is concerned, I've had very favorable experiences. (R-19).

Another instance of unfortunate phraseology in the opinion which inflicts unintended harm upon appellant occurs in the following language:

> "Appellant's excuse that his failure to appear was an oversight--- was one which the Judge did not have to accept. (R 40,4).

There are only two possible interpretations of the above quoted language: (1) that the trial court did not believe appellant's testimony that he was absent as the result of oversight; or (2) that the trial judge believed appellant's testimony but did not consider oversight an adequate excuse for his absence. There is nothing whatever in the record to sustain the first interpretation and nothing to contradict the explanation offered by appellant that his failure to be present was due to oversight. Appellant submits that the record establishes that the trial judge did in fact believe appellant's testimony as to the oversight, and did accept it as true. If the District of Columbia Court of Appeals intended to convey the first meaning, then it wholly misread the record. If it intended to convey the second meaning, then it employed the wrong language, language

which is much more likely to be understood as having the ~~second~~ FIRST meaning.

Chief Justice Taft long ago cautioned that the contempt power must be exercised responsibly and with alert self restraint. Its exercise is "a delicate one," he said, "and care is needed to avoid arbitrary or oppressive conclusions." Cooke v. United States, 267 U. S. 517 (1925). Also see In Re Michael, 326 U.S. 224, 227.

III. The District of Columbia Court of Appeals' Affirmance of Appellant's Criminal Conviction is too Fraught with Actual and Potential Abuse, too Important to Appellant and to Other Members of the Local Bar, to Stand Without Reversal by This Court.

Appellant asks this court to review a dangerous precedent infringing upon the welfare of all local attorneys, because it subjects them to capricious criminal convictions.

It is elementary that one may be convicted only for his own crimes, not the crimes of others. Yet the trial judge made it quite clear that it was the frequent practice of attorneys in knowingly absenting themselves from his court that "obliged" him to find petitioner guilty of contempt. The trial judge also voiced his resentment that attorneys did not accord to the District of Columbia Court of General Sessions equal treatment

with the other courts of this jurisdiction. (R 19-20). Clearly, these were improper considerations in determining whether or not appellant was guilty. Appellant submits that a very dangerous precedent is set when an inadvertent omission by an attorney away from court subjects him to a criminal prosecution for misbehavior in court. To a greater extent than is the case with other citizens, an attorney's very livelihood is dependent upon the regard with which he is held by the public. The severity of the penalty actually imposed ($25.00) cannot be measured in monetary terms, but only in terms of objective indications of the seriousness with which society and in particular, the bench and bar, regards the offense of contempt of court by an attorney.

Appellant submits that this court should intervene where as here, a lower court has injured not only appellant, but other members of the bar of this jurisdiction with a life time criminal stigma, made appellant the butt of undeserved notoriety in the local newspapers, which was damaging to his reputation not only as a solicitor, but to his standing before other judges of the courts of this jurisdiction before whom he must appear in the representation of clients. Furthermore, the ~~prosecution~~ defendant, on very short notice, ~~to defendant~~, was tried by the

United States as a common criminal in a highly publicized trial widely attended by the press, clerks and other court personnel. This tended to weaken the relationship of trust and confidence of petitioner with representatives in the office of the United States Attorney and the clerk's office with whom he must necessarily deal. Irreparably damaged by the unwarranted publicity was the attorney's relations with clients and with the bar in general. Since the precedent upheld in appellant's case was set by the prestigious Chief Judge of the Court of General Sessions, if allowed to stand, other judges may be encouraged to follow the example set by him.

Since the Chief Judge was sitting in Assignment Court when appellant failed to appear, the responsibilities he assumed in judging appellant of contempt were awesome indeed. The nature of the responsibilities were succinctly summed up by the Supreme Court in Green v. United States, 356 U. S. 165, 199 (1958).

> When the responsibilities of a lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause.

In Offutt v. District of Columbia, 75 S. Ct. 11 the Court stated:

> The Judges are also human, and may, in a human way, quite unwittingly identify offense to self with obstruction of law. Accordingly, this court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon the conduct of counsel where the contempt charge is entangled with a judge's personal feeling against the lawyer.

IV. The Use of Contempt Power Infringes Upon Due Process Where a More Reasonable Alternative is Available.

The determination of whether or not a court need resort to the use of its contempt power should involve not only an analysis of the goal sought, but also an analysis of the alternative means of achieving this goal, and the comparative infringement on individual rights. Where the Congress has unambiguously performed this analysis and has arrived at a solution as in D. C. Code 11-982(a) supra, a court should be hesitant to determine that the solution is wrong. Appellant submits that a non-authoritarian judicial system would not stop functioning even if it could not punish at all through the contempt power. 2/

The conclusion of the court below that without expanded contempt powers the trial court would be rendered "virtually

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2/ "The self evident common law principle of responsibility for contempt is, a principle, simply unknown in the civil-law countries." Pekelis, Legal Techniques and Political Ideologies, 41 Mich. L. Rev. 665, 667, 68, (1943).

powerless" to curtail attorney absenteeism (R 40, 3) is definitely not so. (R 49-50).

The trial court has ample powers to deal with attorney "absenteeism." In addition to G. S. Crim. Rule 44 (IVc) and any other rule it may choose to adopt, there are the provisions of D. C. Code Sec. 11-2104. Appellant does not argue that an attorney's absence should never subject him to a penalty. Appellant concedes that no court can afford to tolerate inexcusable, or even excusable, neglect by an attorney, but the penalty should fit the offense. Attorneys who practice regularly in the Court of General Sessions have formed a committee of lawyers which would probably be quite willing to discuss with the judges a schedule of automatic fines or penalties to be imposed for infractions of court rules or discipline.

Appellant is certain that no reasonable attorney would object to a reasonable schedule of fines or penalties imposed under such a procedure, even though the errant attorney may be guilty of no offense but forgetfulness.

In the case of United States v. Jimmie James, Cr. No. 14975-69 which case led to appellant's present discomfiture, appellant eventually succeeded in obtaining a dismissal for want of prosecution. Appellant made no claim for payment under the Criminal Justice Act. Appellant also paid the twenty

five dollar fine assessed by the court and does not demand a refund. Was it also necessary that he be branded a contemptible lawyer before the whole community and bar? Appellant prays that this court will deem it was not.

CONCLUSION

This court should reverse the decision of the court below because the evident error in its interpretation of Congressional statute leads to a substantial conflict of law and policy existing between the decisions of this court and of the courts below as they relate to the exercise of contempt powers in this jurisdiction.

Respectfully submitted,

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APPENDIX

OPINION OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5042

Grant Sykes, Appellant,

v.

United States, Appellee.

Appeal from the District of Columbia
Court of General Sessions

(Argued December 8, 1969 Decided February 4, 1970)

Andrew A. Lipscomb for appellant.

Broughton M. Earnest, Assistant United States Attorney, with whom Thomas A. Flannery, United States Attorney, John A. Terry and Axel H. Kleiboemer, Assistant United States Attorneys, were on the brief, for appellee.

Before Kelly, Fickling and Kern, Associate Judges.

FICKLING, Associate Judge: Appellant, a practicing attorney in the District of Columbia, was served with an order to show cause why he should not be held in contempt of court for his failure to appear in the Assignment Branch of the Criminal Division of the District of Columbia Court of General Sessions at a time when he had a case on the court calendar. 1/ Following his hearing, appellant was found in contempt and fined. This appeal followed the denial of his motion for a rehearing.

The facts are not in dispute. Appellant was appointed as the attorney for a defendant in a criminal action which came before the court on April 28, 1969. On that date the Government was not ready to go to trial and sought a continuance. At appellant's

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1/ A judge of the Court of General Sessions "may punish for disobedience of an order, or for contempt committed in the presence of the court. . ."
D. C. Code 1967, Sec. 11-982(a).

unexcused absence may be held to be contempt of court, provided notice and an opportunity to be heard are given, under D. C. Code 1967, Sec. 11-982(a). 5/ See In re Shorter, supra; In re Saul, supra. To hold otherwise would leave the trial court virtually powerless, notwithstanding GS Crim. Rule 44 IV c, 6/ to deal with attorneys who are lax in their duties to the court.

> Elusive attorneys are a recurring problem in trial courts, particularly in calendar departments, a fact of which this court may take judicial notice. /Several/ cases of this nature have reached this court in the past decade, and in /some/ of those cases there was evidence of repeated offenses by the attorneys held in contempt. /To hold that Attorney Sykes' failure to appear at the appointed hour was not contempt committed in the presence of the court within the meaning of our statute/ would provide insulation to attorneys who now overextend themselves, and encourage them to go further in trying the patience of trial judges through absences which obstruct normal court-room procedure but border upon being excusable. 7/

Moreover, appellant's reliance on Klein v. United States, 80 App. D. C. 106, 151 F.2d 286 (1945), is misplaced. There, the court was construing 28 U.S.C. Sec. 385 (1940), 8/ which relates to proceedings for contempt committed in a Federal court. In any event, in that case the contemner was cited for refusing to return to the court when ordered to do so. Since the contemner was in New York City at the time the court reconvened, it was held that the act of refusing to return was not committed in the presence of the court within the meaning of Nye v. United States, 313 U. S. 33 (1941). Parenthetically, we note that the court stated in Klein that had the charge been different, the result would have doubtless been different. 80 U. S. App. D C. at 108, 151 F.2d at 288.

We hold also that the evidence was sufficient to support the court's finding of contempt. Appellant's excuse that his failure

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5/ See n.1.

6/ See n.2.

7/ Arthur v. Superior Court, 62 Cal. 2d at 409, 42 Cal. Rptr. at 444-45, 398 P.2d at 780-81.

8/ Predecessor of 18 U.S.C. Sec. 401 (1964).

request, May 8, 1969, was the date set for trial. Appellant made note of this date in his record book but, failing to refer to that notation, he never appeared for trial. Instead, relying upon his memory for his appointments, he appeared and argued a case before the United States Court of Appeals for the District of Columbia Circuit. After leaving that court between 10 and 10:30 a.m., he spent about an hour in a law library. Then, he took care of some business in the Criminal Clerk's office in the Court of General Sessions and, at noon, returned to his office and went to lunch. At about 2 p.m., a stenographer in his office told him of a phone call received that morning from a court, which she had forgotten about, reminding him that he had a case that day. She did not remember who had called, from which court, or concerning which case. Appellant "presumed that it was the /Circuit/ Court of Appeals reminding /him/ although /he/ thought it was strange."

The appellant's main contentions on appeal are (1) that his failure to appear in court was not contempt committed in the court's presence, and (2) that the evidence was insufficient to convict him for contempt. We do not agree, and therefore we affirm.

As a general rule, any unexcused absence of an attorney from the courtroom where he has a duty to appear at an appointed time as counsel for a party may constitute contempt of court. 2/ In re Shorter, D. C App., 236 A.2d 318 (1967) and In re Saul, D. C. Mun. App., 171 A.2d 751 (1961), we have implicitly followed those jurisdictions which have embraced the minority rule that such absence is contempt committed in the court's presence. 3/ Today, we explicitly adopt the rule that where an attorney fails to appear in court when he has a duty to do so, "the offensive conduct, to wit, the absence, occurs in the presence of the court" 4/ and the

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2/ Annot., 97 A.L.R.2d 431 (1964), and cases cited therein. In a criminal case, it may also lead to an attorney's suspension from the panel of those available for appointment as counsel. GS Crim. Rule 44 IV c (formerly GS Crim. Rule 24 II(c)).

3/ Annot., supra n.2 at 457-59.

4/ Arthur v. Superior Court of Los Angeles County, 62 Cal.2d 404, 409, 42 Cal. Rptr. 441, 444, 398 P.2d 777, 780 (1965) (in bank).

to appear was an oversight due to the pressure of other matters was one which the judge did not have to accept. Appellant kept a record book in which he recorded his court appointments but, instead, relied upon his memory in the instant case. He failed to inquire about which court had attempted to contact him, after being told by the stenographer that he had received what he admittedly thought was a strange call. Nor did he at that time check his record book, since he presumed it was the Circuit Court. And, while it may be true that he could not avoid the conflict between court engagements, he did nothing to mitigate the effect of his absence. His failure to appear in the Assignment Court at any time on May 8 because of oversight, neglect, or faulty recollection was inexcusable.

We have considered the other contentions of the appellant and find them without merit.

Affirmed.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,065

GRANT SYKES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
AXEL H. KLEIBOEMER,
BROUGHTON M. EARNEST,
ROGER M. ADELMAN,
Assistant United States Attorneys.

DCCA No. 5042

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III

ISSUE PRESENTED *

In the opinion of appellee the following issue is presented:

Whether the District of Columbia Court of Appeals properly held that, within the meaning of 11 D.C. Code § 982(a), appellant's failure to appear in court when he was obligated to do so was a contempt committed in the presence of the court?

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* This case has not previously been before this Court.

United States Court of Claims

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,008

GRANT SYKES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 12, 1969, appellant was served with an order to show cause why he should not be held in contempt of court for failing to appear in the Criminal Assignment Branch of the Criminal Division of the District of Columbia Court of General Sessions for a scheduled trial. On May 13 appellant, represented by counsel, was tried before Chief Judge Harold H. Greene, sitting without a jury, and found guilty of contempt of court pursuant to 11 D.C. Code § 982 (a). He was fined $25. After his motion for a new trial was denied by Chief Judge Greene, appellant appealed to the District of Columbia Court of

Appeals. That court affirmed his conviction on February 4, 1970.[1] Appellant petitioned for allowance of an appeal to this Court, and on July 8, 1970, his petition was granted.

Appellant was the appointed attorney of record in *United States* v. *James*, Criminal No. 14975-69, which came before the Criminal Division of the Court of General Sessions on April 28, 1969 (Tr. 1). At appellant's request the case was continued to May 8, 1969, for trial, although the Government had sought a longer continuance (Tr. 7). Appellant entered the date, May 8, in his notebook in which he kept the dates of his court cases (Tr. 11). On May 8, however, appellant did not appear, and the case had to be continued until May 13 because of his absence (Tr. 1).

At the hearing before Chief Judge Greene appellant testified that on the morning of May 8 he was scheduled to argue a case before this Court. Relying on his memory instead of his notebook, he went directly from his home to the United States Court House for the argument and did not check at his office or in the Court of General Sessions (Tr. 10-11). He said he had simply forgotten that the trial in the *James* case was scheduled for May 8 and was under the impression it was set for the following week (Tr. 5, 9). The argument before this Court in his other case concluded shortly after 10:00 a.m., and appellant then went to the Bar Association Library, where he stayed for about an hour. He went from there to the Clerk's Office in the Criminal Branch of the Court of General Sessions to look up a paper,[2] then visited his office briefly and, shortly after noon, went to lunch (Tr. 8, 13-14). Returning to his office from lunch at approximately 2:00 p.m., appellant was told by a secretary that

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[1] *Sykes* v. *United States*, 264 A.2d 894 (D.C. Ct. App. 1970).

[2] Although the criminal cases set for trial each day are listed on a sheet posted in the anteroom of the Clerk's Office where appellant was doing his business, he did not bother to check the list (Tr. 14).

she had forgotten to tell him he had received a phone call that morning from "the court" reminding him that he had a case that day. Appellant asked her who had called, but she did not remember who or from what court. Appellant stated that he "presumed that it was the Court of Appeals reminding me, although I thought it was very strange" (Tr. 9). He made no further inquiry into the matter.

ARGUMENT

The District of Columbia Court of Appeals properly held that appellant's failure to appear in court when he was obligated to be present was a contempt committed in the presence of the court within the meaning of 11 D.C. Code § 982 (a).

Appellant's principal contention in this appeal is that because 11 D.C. Code § 982 (a) authorizes judges of the Court of General Sessions to punish contempts "committed in the presence of the court," his absence from court where he was obligated to be there could not be punished as contempt. The ensuing discussion shows that this argument is meritless.

Necessarily involved in analysis of the law of contempt in appellant's case are three matters: jurisdiction to punish contempts, the substantive law of contempt, and the procedures to be followed in citing and punishing contemnors. The applicable portion of section 982 (a)[3] appears *prima facie* to be concerned only with jurisdiction. It neither defines what behavior is contemptuous[4] nor

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[3] Section 982 (a) provides:

> The District of Columbia Court of General Sessions may compel the attendance of witnesses by attachment, and, in any civil or criminal case or proceeding in the court, the judge may punish for disobedience of an order, *or for contempt committed in the presence of the court*, by a fine not exceeding $50 or imprisonment not exceeding 30 days. [Emphasis added.]

[4] *Compare* 18 U.S.C. §§ 401, 402; CAL. CIV. P. CODE § 1209 (West 1970).

specifies procedures for punishing contemnors.[5] In the factual setting of appellant's case, however, it is apparent that jurisdiction and the substantive law of contempt are intertwined, for in order to determine the initial question of whether the trial court had jurisdiction to cite appellant, it must also be determined whether, as a matter of substantive law, his absence can be a contempt committed in the presence of the court. *See Chula* v. *Superior Court*, 57 Cal. 2d 199, 368 P.2d 107, 18 Cal. Rptr. 507 (1962). Because the applicable portion of section 982 (a) permits punishment of direct but not indirect contempts, if appellant's absence was not substantively a contempt in the court's presence, then the court had no jurisdiction to cite and punish him.

It is clear, however, that the District of Columbia Court of Appeals' conclusion that appellant's absence was a direct contempt was fully justified as a matter of substantive law. There being no statute other than section 982 (a) relating to contempt in the Court of General Sessions,[6] judicial decisions provide the only guidance for resolution of the substantive-jurisdictional question. Though cases have held the opposite,[7] there is nothing conceptually to prevent a determination, as in appellant's case, that absence from court is a direct contempt. The rationale for construing certain acts and omissions as direct contempts is that all the relevant facts occur before the judge, and he therefore can cite and punish the contemnor without further proceedings. *Ex parte Terry*, 128 U.S. 289 (1888). If a lawyer fails to appear in court when he is obligated to do so, all of the relevant facts—specifically, the absence offending the dignity, authority and efficiency of the court—have occurred in the court's presence. This view has been accepted in numerous state

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[5] *Compare* Rule 42, FED. R. CRIM. P.

[6] See discussion *infra* at pp. 7-8.

[7] *See, e.g., Rogers* v. *Superior Court*, 2 Ariz. App. 556, 410 P.2d 674 (1966); *Ex parte Hill*, 122 Tex. 80, 52 S.W.2d 367 (1932); *State* v. *Winthrop*, 148 Wash. 526, 269 P. 793 (1928).

cases [8] and in the only applicable federal case,[9] as well as having been adopted *sub silentio* in District of Columbia Court of Appeals decisions prior to the one in appellant's case. *See In re Shorter*, 236 A.2d 218 (D.C. Ct. App. 1967); *In re Saul*, 171 A.2d 751 (D.C. Mun. Ct. App. 1961); *see also* Rule 42 (a), FED. R. CRIM. P. The statement of Chief Judge Gibson, concurring in *Chula* v. *Superior Court*, *supra*, aptly states the theoretical justification for the finding of contempt and also for the assumption of jurisdiction:

> Where the attorney, although notified by the court to appear at a specific time, fails to do so, and does not offer an excuse, all matters relevant to the determination of contempt happen in court. In those cases where the attorney seeks to excuse his conduct, the excuse ordinarily will be based on matters occurring out of court. However, the contingency that an attorney who is absent may later offer an excuse should not compel a judge, when instituting proceedings, to treat the conduct as indirect rather than direct contempt. 57 Cal. 2d at ——, 368 P.2d at 112, 18 Cal. Rptr. at 512.

There was, therefore, a sound legal basis for the District of Columbia Court of Appeals decision. Moreover, as a practical matter, a finding of direct contempt was the only way an absent lawyer such as appellant could be punished by a judge in the Court of General Sessions.

Although the District of Columbia Court of Appeals, by practical necessity as well as by a proper conception of the law, treated appellant's absence as a direct contempt, it reaffirmed that notice and hearing were required before a conviction could be entered:

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[8] *Arthur* v. *Superior Court*, 62 Cal. 2d 404, 398 P.2d 777, 42 Cal. Rptr. 441 (1965); *Chula* v. *Superior Court*, *supra*; *Lyons* v. *Superior Court*, 42 Cal. 2d 755, 278 P.2d 681, *cert. denied*, 350 U.S. 876 (1955); *Vaughn* v. *Municipal Court*, 252 Cal. App. 2d 348, 60 Cal. Rptr. 575 (1967); *In the Matter of Clawans*, 69 N.J. Super. 373, 174 A.2d 367 (1961).

[9] *United States* v. *Anonymous*, 215 F. Supp. 111 (E.D. Tenn. 1963).

> [W]here an attorney fails to appear in court when he has a duty to do so, "the offensive conduct, to wit, the absence, occurs in the presence of the court" and the unexcused absence may be held to be contempt of court, *provided notice and an opportunity to be heard are given*, under D.C. Code § 11-982 (a) 1967. 264 A.2d at 895 (footnote omitted; emphasis added).

It is clear, therefore, that rather than adopting the "minority" rule across the board, as appellant implies (see brief for appellant at 9), the court by requiring notice and hearing effectively adopted the procedural pattern for the disposition of indirect contempts. As a practical matter contemnors like appellant receive the due process safeguards of indirect contemnors. Appellant, of course, was put on notice by the show cause order and subsequently was accorded a full hearing before Chief Judge Greene before he was found guilty of contempt. The only purpose served by the District of Columbia Court of Appeals' allusion to the "minority rule" was to indicate that there was initial jurisdiction to cite appellant.[10] In all other respects he—like other absent attorneys in the past—was treated in accordance with the "majority rule." *See In re Shorter, supra*; *In re Saul, supra.*

Appellant also argues that the District of Columbia Court of Appeals decision conflicts with this Court's decision in *Klein* v. *United States*, 80 U.S. App. D.C. 106, 151 F.2d 286 (1945), as well as other decisions construing what is now 18 U.S.C. § 401. However, these federal cases, interpreting a different statute for a different system of courts, have no controlling influence on

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[10] The so-called "minority rule" cases appearing in Annot., 97 A.L.R.2d 431, 457-459 (1964), merely state that an attorney's absence is a direct contempt which *may* be punished summarily without notice and hearing. The District of Columbia Court of Appeals decision in appellant's case obviously relied on these cases only for their jurisdictional holdings, since it did not intimate that a General Sessions judge could proceed to punish an absent attorney summarily but required notice and hearing in all such cases. Furthermore, even though the "minority cases" give the judge power in theory to punish summarily, in each the lawyer was nevertheless given an opportunity to explain his absence.

the Court of General Sessions or the District of Columbia Court of Appeals and do not, in any event, conflict with the conclusions reached in appellant's case.

Appellant appears to have once again lost sight of the fact that his case is governed by 11 D.C. Code § 982 (a), not by 18 U.S.C. § 401. Section 401 applies only to courts of the United States.[11] The Court of General Sessions is not a court of the United States as defined in 28 U.S.C. § 451:

> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title . . . and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Cf. Tate v. *United States*, 123 U.S. App. D.C. 261, 359 F.2d 245 (1966), and cases cited therein at 267 n.7, 359 F.2d at 251 n.7. Since judges of the Court of General Sessions at the time of appellant's conviction held office for ten years,[12] subject to reappointment (11 D.C. Code § 902), 28 U.S.C. § 451 excludes those courts from cov-

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[11] 18 U.S.C. § 401 reads:

> A *court of the United States* shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command. [Emphasis added.]

Compare 18 U.S.C. § 402, which discusses the disposition of contempts constituting crimes committed by individuals, corporations or associations who wilfully disobey "any lawful writ, process, order, rule, decree or command *of any district court of the United States or any court of the District of Columbia* . . . ." [Emphasis added.]

[12] Judges appointed to the newly established Superior Court will serve fifteen-year terms. Pub. L. No. 91-358, § 101, 84 Stat. 491 (July 29, 1970).

erage of 18 U.S.C. § 401.[13] Thus the authorities cited by appellant which construe section 401 or its predecessor [14] are not applicable to his case, and neither Chief Judge Greene nor the District of Columbia Court of Appeals was bound to follow them.[15] Significantly, the only federal case decided under section 401, which became effective in 1948, passing on the issue of a lawyer's absence from court reached the same conclusion as did the District of Columbia Court of Appeals in appellant's case. In *United States* v. *Anonymous*, *supra*, an attorney failed to appear for the start of a criminal trial in which he had been appointed as defense counsel. His absence was due to a fire the night before which had destroyed a building he owned. The trial judge considered his troubles only toward mitigation of punishment, and convicted him of contempt on the basis of 18 U.S.C. § 401, clearly implying that his absence was a contempt in the court's presence.[16]

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[13] Although the definition of a court of the United States is found in Title 28 of the United States Code and the statute appellant assumes to be applicable is found in Title 18, the Title 28 definition would seem to be controlling. Title 28 is entitled "Judiciary and Judicial Procedure" and contains many fundamental definitions applicable to the entire United States Code, whereas Title 18, entitled "Crimes and Criminal Procedure," contains no definition at all of a court of the United States.

[14] 28 U.S.C. § 385 (1940).

[15] *Klein* v. *United States*, *supra*, in addition to dealing with a different statute than that applicable to appellant's case, is distinguishable also because the contemptuous behavior there was more than an absence from court. The contemptuous conduct was the refusal of Klein in New York City to return to court in Washington, not the mere absence from the court in this city.

[16] Appellant's other contentions are without merit. There is no need, in the case of a lawyer absent from court, for a finding of intent or willfulness to disturb the dignity of the court and the orderly administration of justice. *See United States* v. *Anonymous*, *supra*. Appellant's absence spoke for itself and made out a *prima facie* case against him, which he had an opportunity to rebut at the hearing before Chief Judge Greene. Though excuse or negligence may go toward mitigation of sentence in an appropriate case, it does not mitigate the offense itself. In any event, appellant's conduct was more than mere negligence. Nothing in the record shows that

CONCLUSION

WHEREFORE, appellee respectfully submits that the decision of the District of Columbia Court of Appeals should be affirmed.

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appellant, even after he was informed of it, took any steps to investigate the "strange" telephone call after he learned of it at 2:00 p.m. Considering this actual notice and his duties to the court and his clients, appellant's conduct on May 8 is more properly characterized as reckless disregard for the consequences rather than mere negligence. As appellant himself concedes, "*no court can afford to tolerate inexcusable, or even excusable, neglect by an attorney,* but the penalty should fit the offense" (brief for appellant at 17) (emphasis added). On the latter score, there is no merit to appellant's argument that because other courses than a contempt citation were open to the court, he should not have been punished under the contempt power. One who is clearly subject to punishment under two or more statutes has no right to select which one he should be the vehicle of prosecution. *Hutcherson* v. *United States,* 120 U.S. App. D.C. 274, 345 F.2d 964 (1965).

There also was no reason for Chief Judge Greene to disqualify himself from hearing appellant's case. A judge before whom a contempt occurs is qualified to try the contemnor. *Sacher* v. *United States,* 343 U.S. 1 (1952). It is only in the rare instance where the judge allows his personal feelings to become *embroiled* with the offender that he must disqualify himself. *Offutt* v. *United States,* 348 U.S. 11 (1954). The record in this case does not even hint at such embroilment by Chief Judge Greene.

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